

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES FOR THE USE	:	CIVIL ACTION
AND BENEFIT OF SPECIAL-LITE,	:	
INC.	:	
Plaintiff	:	
	:	
v.	:	
	:	
REPUBLIC WESTERN SURETY CO.,	:	
	:	
Defendant	:	No. 97-7400

M E M O R A N D U M

**Padova, J.**

May 20, 1998

Plaintiff, the United States for the use and benefit of Special-Lite, Inc. ("Special-Lite"), has brought this action against Defendant, Republic Western Surety Company ("Republic Western"),<sup>1</sup> for breach of obligations on a bond that Republic Western issued pursuant to the Miller Act, 40 U.S.C.A. § 270a-270e (West 1986 & Supp. 1988). Defendant has filed a Motion to Dismiss the Complaint unless Plaintiff files an Amended Complaint naming Town Supply Co., Inc., ("Town Supply") as a necessary party Defendant. For reasons that appear below, Defendant's Motion will be denied.

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<sup>1</sup>Defendant states in a footnote in its Memorandum in Support of its Motion to Dismiss that the bond in question "was issued by Republic Western Insurance Company, not by named defendant Republic Western Surety Company." (Deft.'s Mem. in Supp. at 1.) However, Defendant does not deny that it is a proper party to this action.

## I. BACKGROUND

This section presents the facts as they appear in Plaintiff's Complaint and adds some additional facts supplied by Defendant in its Motion. The federal government entered into a contract with Sun Technical Services, Inc. ("Sun") for the construction of a Veterans Administrative Hospital in Coatsville, Pennsylvania. Sun then entered into a contract with Town Supply, who was to supply doors and frames for the project for a cost of \$146,046. Town Supply, in turn, contracted with Special-Lite, who agreed to supply the doors for a cost of \$70,000. Because the hospital was being constructed for the federal government, Sun, as principal contractor, was required to post a payment bond for the protection of those supplying labor and materials pursuant to the Miller Act.<sup>2</sup> 40 U.S.C.A. § 270a. Defendant issued the bond.<sup>3</sup>

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<sup>2</sup>Title 40 U.S.C.A. § 270a, entitled "Bonds of contractors for public buildings or works," provides in pertinent part:

Before any contract, exceeding \$25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor";

- (1) A performance bond . . . .
- (2) A payment bond with a surety or sureties satisfactory to [the] officer [awarding such contract] for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. . . .

<sup>3</sup>The bond states that the "Surety binds itself, jointly and severally with the Principal, for the payment of the sum shown opposite the name of the surety." (Compl. Ex. 2.) The sum shown

Special-Lite delivered what was required to Town Supply under the purchase order as modified by certain agreed-upon extras and adjustments, and Special-Lite billed Town Supply for \$73,499. Although the Veterans Administration made full payment to Sun, Sun made only partial payment to Town Supply, leaving an outstanding balance of \$17,400. Town Supply, in turn, made only partial payment to Plaintiff, Special-Lite, leaving an outstanding balance of \$17,499. Special-Lite notified Defendant of the outstanding balance and made a formal claim against the bond. When payment was not forthcoming, Plaintiff brought this action against Defendant, as provided by the Miller Act.<sup>4</sup>

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is just over \$10,000,000.

<sup>4</sup>Title 40 § 270b, entitled "Rights of persons furnishing labor or material," provides in pertinent part:

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270A to 270D of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, . . .

Defendant attaches to its Motion copies of a complaint and a release in a prior law suit brought in this Court concerning the same construction project. Town Supply Co. v. Republic Western Surety Co., No. 97-CV-1126, filed Feb. 14, 1997. The complaint and release provide additional material which may be relevant to this case.<sup>5</sup> In the prior case before this Court, Town Supply claimed that Sun had failed to pay it for all of the material it supplied. Town Supply had sued the surety, Republic Western, under the same surety bond at issue in this case for \$47,052. Republic Western settled that suit for \$25,000. In a deposition of Town Supply's President, T. Andrew Dzedzy, Jr., taken in conjunction with that suit, Town Supply admitted that it had not paid all of Special-Lite's invoices on the project. (Deft.'s Mem. in Supp. Mot. to Dis. Ex. A.) Defendant contends that, as a result of that suit, Town Supply had the money to pay Special-Lite, but did not do so. In this suit, another plaintiff, Special-Lite, has sued the same defendant on the same payment bond.

Defendant contends that if it pays Special-Lite in this suit the money Town Supply owes, but did not pay, after it has already paid Town Supply in the previous suit the money Sun owed Town Supply, but did not pay, Defendant will end up paying double

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<sup>5</sup>Because this Motion to Dismiss was brought under Federal Rule of Civil Procedure 12(b)(7), the Court may look outside the facts presented in or attached to the Complaint without converting the Motion to one for summary judgment. Fed.R.Civ.P. 12(b).

and Town Supply will be unjustly enriched. Defendant has therefore filed this Motion seeking joinder of Town Supply as a necessary party defendant.

## II. LEGAL STANDARD

A Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(7) is based on a failure to join a party under Rule 19. Rule 19, entitled "Joinder of Persons Needed for Just Adjudication," provides in pertinent part:

**(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.P. 19(a).<sup>6</sup> The United States Court of Appeals for the Third Circuit ("Third Circuit") has instructed this court as to the proper analysis under Rule 19:

Rule 19(a) determines whether a party is a necessary party who should be joined in the action. If the answer to that first question is yes, then the court must do so if feasible. If the answer to the first question is no, however, then the inquiry need go no further. See Abel v. American Art Analog, Inc., 838

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<sup>6</sup>Defendant contends, and Plaintiff does not contest, that joinder of Town-Supply would not deprive the Court of jurisdiction over the case. The Court agrees.

F.2d 691, 695 (3d Cir. 1998) (foreclosing any further inquiry once the panel "conclude[d] that [absentees] are not necessary parties pursuant to Rule 19(a)").

Bank of America National Trust and Savings Ass'n. v. Hotel Rittenhouse Assoc., 844 F.2d 1050, 1053-54 (3d Cir. 1988).

In determining whether the party whose joinder is sought is necessary under Rule 19(a),

we ask first whether complete relief can be accorded to the parties to the action in the absence of the unjoined party. Fed.R.Civ.P. 19(a)(1). A Rule 19(a)(1) inquiry is limited to whether the district court can grant complete relief to the persons already parties to the action. The effect a decision may have on the absent party is not material.

Janney Montgomery Scott, Inc. v. Shepard Niles, 11 F.3d 399, 405 (3d Cir. 1993) (citation omitted). "The burden of proof is on the moving party to show one of the circumstances in Rule 19(a) exists." Trans Ocean Container Corp. v. Intercargo Insurance Co., No. C 95-2187 FMS, 1995 WL 870958, at \*1 (N.D. Cal. Dec. 20, 1995) (citation omitted). If the Court determines that the non-party is necessary, it asks whether the non-party's joinder would destroy the Court's jurisdiction. If it would, the Court then analyzes the case in terms of Rule 19(b) to see whether the non-party is indispensable.

### **III. DISCUSSION**

As the Third Circuit has directed, this Court shall first determine whether Town Supply is a necessary party under Rule 19(a), which provides that a person is necessary if

(1) in the person's absence complete relief cannot be accorded among those already parties, or

(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may

(i) as a practical matter impair or impede the person's ability to protect that interest or

(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.P. 19(a) (emphasis added) (format altered).

Defendant contends Town Supply is a necessary party because its non-joinder will lead to all three problems identified by Rule 19(a): a lack of complete relief among the present parties (19(a)(1)); the possible impairment of Town Supply's ability to protect its interests (19(a)(2)(i); and a Defendant who may be subjected to double, multiple, or otherwise inconsistent verdicts (19(a)(2)(ii). (Deft.'s Mem. in Supp. at 5.) However, only the first of these three sub-sections applies to this case. It states that a person is necessary if, in his absence, "complete relief cannot be accorded among those already parties." Rule 19(a)(2)(i) and (ii) apply only where the person whose joinder is sought "claims an interest relating to the subject of the action." Defendant, who has the burden of showing that Town Supply is a necessary party, does not contend that Town Supply claims an interest in this litigation, merely that it has an interest. See Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 49 (2d Cir. 1996) ("As to the second part of Rule 19(a), [the

defendant's] argument fails here if only because the [non-party] has not 'claim[ed] an interest relating to the subject of the action'"). In the prior law suit, Town Supply claimed an interest in the payment bond that is the subject of this law suit, but that case was settled, and there is no demonstration or allegation that Town Supply presently claims an interest in the bond. The inquiry as to whether Town Supply is a necessary party in this case is thus limited to 19(a)(1), which asks whether complete relief can be accorded to the parties already in the case in the absence of Town Supply.

Defendant states that Rule 19(a)(1) "'is designed to protect those who are already parties by requiring the presence of all persons who have an interest in the litigation so that any relief that may be awarded will effectively and completely adjudicate the dispute.'" (Deft.'s Mem. in Supp. at 5-6 (quoting 7 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1604, at 42 (2d ed. 1986)).) The Third Circuit interpreted the phrase "complete adjudication of the dispute" that appears in Rule 19(a)(1) in Angst v. Royal Maccabees Life Insurance Co., 77 F.3d 701 (3d Cir. 1993). In Angst, an alternative beneficiary of two life insurance policies sought the proceeds following the insured's death. The receiver for the insured's law practice moved to intervene, but his joinder destroyed diversity. Because the district court had failed to make an explicit Rule 19 determination, the Third Circuit made an independent analysis. It first addressed the



question whether the receiver was a necessary party under Rule 19(a), and after deciding that it was, it went on to decide whether it was an indispensable party under Rule 19(b). In the Rule 19(a) analysis, the Court of Appeals determined that the intervenor was not a necessary party under Rule 19(a)(1), but that it was a necessary party under Rule 19(a)(2). It is the 19(a)(1) analysis that concerns us here.

The Third Circuit analyzed the requirement of "complete adjudication of the dispute" in Rule 19(a) as follows:

Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought. The present parties will not receive "hollow relief" without the receiver. . . . [t]he only issue between [the present parties] is whether [the plaintiff] is entitled to the proceeds as a named beneficiary under the contract. [The receiver's] interest in the litigation would theoretically not come into play until after [the plaintiff] had received the proceeds, . . . The possibility that [one] party to the original litigation might have to defend against a subsequent suit by the receiver does not make the receiver a necessary party to the action.

Angst, 77 F.3d at 705.

To be sure, as Defendant points out, there are factual differences between Angst and the instant case: Angst was not a Miller Act case; this case is. In Angst, the party determined to be necessary sought to intervene; here Defendant seeks to join that party. In Angst, the successful party faced the possibility that he might have to defend against a subsequent suit by the receiver; here, Defendant states that it would have to initiate a subsequent suit against Town Supply. In this case,

unlike in Angst, Defendant claims that Town Supply defaulted in paying Plaintiff, that Defendant already satisfied Plaintiff's claim, in effect, by paying Town Supply in a previous suit, and that, and unless Town Supply is joined, Defendant will have to pay twice.

Despite these differences, the Court finds that Angst applies in this case. "Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought." Angst, 77 F.3d at 705. The only issue between the present parties to this suit is whether Plaintiff is entitled to payment from Defendant on the payment bond. The fact that Defendant already paid Town Supply on the bond and that Defendant expected Town Supply to pay Plaintiff out of that money does not affect the rights and obligations as between Plaintiff and Defendant.<sup>7</sup> It is an issue between Defendant and Town Supply. In Angst, the fact that the receiver's absence would likely lead to a subsequent suit "[did] not make the receiver a necessary party to the action." The Court concludes the same is true in this case. The fact that, if Plaintiff prevails, Defendant will likely sue Town Supply in a

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<sup>7</sup>Plaintiff's counsel in this case was Town Supply's counsel in the prior case. He contends that Town Supply could have avoided being sued twice on the bond by including all unnamed suppliers, such as Special-Lite, in the settlement agreement in that suit. He further states that he suggested such a solution at the time, but that counsel for Defendant and for Sun rejected the suggestion. Whether or not those allegations are true as stated does not affect the disposition of Defendant's Motion to Dismiss in this case.

subsequent suit does not make Town Supply a necessary party to this action.<sup>8</sup>

Because the Court has determined that Town Supply is not a necessary party in this law suit, "the inquiry need go no further." Bank of America, 844 F.2d at 1050. Therefore, the Court will not address Defendant's other arguments.

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<sup>8</sup>In this case, as in the prior suit against Defendant in this Court, the plaintiff could have sued the party with whom it contracted, either in addition to or instead of the surety.

As the Third Circuit stated in Downer v. United States Fidelity & Guaranty Co. of Md., 46 F.2d 733 (3d Cir. 1931):

It is not generally necessary, in order to obtain judgment upon an official bond against the sureties, that a judgment against the principal be produced in evidence, or that he be a party to the suit against the sureties. Their liability is direct and not collateral, their bond is joint and several and all that is necessary to obtain a judgment against them is to show a breach by the principal of the condition of the bond, for their undertaking is that such a breach should not occur, and it is immaterial whether the principal is before the Court or not.

Id. at 734 (quotations and citation omitted). While Downer dealt with Pennsylvania and West Virginia law, the general principle it states applies in this case as well. "The obligation imposed by the bond and the liability resulting from a violation of its terms are primary and absolute. It is no answer or defense that the plaintiff has not chosen to pursue the principal first [or jointly with the surety], if he is following a remedy given by the bond." Id. See, e.g., Henderson et al. v. Nucon Construction Co., 49 F.3d 1421, 1423 (9th Cir. 1995) ("[A]ll courts to consider the question have concluded that a surety alone may be sued by a subcontractor under the Miller Act") (citations omitted); Statham Instruments v. Western Casualty & Surety Co., 359 F.2d 521, 524 (6th Cir. 1966) ("The Miller Act grants to the plaintiff the right to recover from the principal or surety, or both, for work and material supplied"). In this case, as in the prior case, the plaintiff chose to sue the surety only, and it entitled to do so.

#### **IV. CONCLUSION**

For reasons discussed above, the Court has determined that Town Supply is not a necessary party to this suit and need not be joined under Federal Rule of Civil Procedure 19(a). Defendant's Motion to Dismiss Plaintiff's Complaint unless Town Supply is added as a party defendant will therefore be denied.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES FOR THE USE	:	CIVIL ACTION
AND BENEFIT OF SPECIAL-LITE,	:	
INC.	:	
Plaintiff	:	
	:	
v.	:	
	:	
REPUBLIC WESTERN SURETY CO.,	:	
	:	
Defendant	:	No. 97-7400

O R D E R

**AND NOW**, this                      of May, 1998, upon consideration of the Motion of Defendant, Republic Western Surety Co. to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(7) (Doc. No. 4), the Response of Plaintiff the United States for the Use and Benefit of Special-Lite, Inc. (Doc. No. 5), and Defendant's Reply (Doc. No. 6), **IT IS HEREBY ORDERED** that Defendant's Motion is **DENIED**.

BY THE COURT:

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JOHN R. PADOVA, J.